

REMARKS/ARGUMENTS

Re-examination and favorable reconsideration in light of the above amendments and the following comments are respectfully requested.

Claims 37 - 81 are pending in the application. Currently, all claims stand rejected.

By the present amendment, claims 37, 45, and 66 - 69 have been amended and new claim 82 has been added to the application. The amendments to claims 66 - 69 are to correct an inadvertent typographical error and not for reasons relating to patentability.

In the office action mailed March 25, 2008, claims 37 - 45, 48, 52, 58, 59, and 66 - 81 have been provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 32 - 39, 53, 56 - 69, and 72 - 73 of copending application no 10/542,935; claims 37 - 79 were rejected under 35 U.S.C. 112, second paragraph, as being indefinite; claims 37 - 63, 65 - 71, 76, and 80 - 81 were rejected under 35 U.S.C. 103(a) as being unpatentable over PCT publication no. WO/2001/068,355 to Dambricourt in view of U.S. Patent No. 5,314,746 to Johnson et al.; claims 64, 77, and 79 were rejected under 35 U.S.C. 103(a) as being unpatentable over Dambricourt in view of Johnson et al. and further in view of U.S. Patent No. 5,372,863 to Nishikawa; claims 73 - 75 were rejected under 35 U.S.C. 103(a) as being unpatentable over Dambricourt in view of Johnson et al. and further in view of PCT publication no. WO/2001/094,213 to Doherty et al.

The foregoing rejections are traversed by the instant response.

With respect to the provisional rejection of claims 37 - 45, 48, 52, 58, 59, and 66 - 81 on grounds of obviousness type double patenting, it is respectfully submitted that the

aforesaid claims differs from the claims of the co-pending application of SN 10/542,535. The claims of the '535 patent application concern a fully emptiable flexible tube with an amplified return effect. There is no mention in these claims of any technique for improving the conditions of dispersion of the flexible modulus of the constituents of a resin composition, in other words, the dispersion factor Kd. The Examiner argues that the physical property would be inherent; however, the Examiner makes no effort to make a case of inherency. The Examiner in making the rejection does not state why the missing subject matter is necessarily present in the claims in the '535 application and would be so recognized by one of ordinary skill in the art. Still further, the Examiner presents no extrinsic evidence which would establish that the missing subject matter is necessarily present in the claims in the '535 patent. Thus, the Examiner has failed to meet his burden to establish an inherency argument. With respect to obviousness, the Examiner has merely provided a conclusory statement. There is no *Graham v. John Deere* analysis and no technical line of reasoning presented in the rejection which would establish that the missing subject matter would be obvious to one of ordinary skill in the art. Thus, the Examiner has not met his burden of establishing a *prima facie* case of obviousness. For these reasons, the provisional rejection should be withdrawn.

With respect to the rejection of claims 37 - 79 under 35 U.S.C. 112, second paragraph, claim 37 no longer contains a broad range or limitation together with a narrow range or limitation. Similarly, claims 66 - 69 have been amended to delete the objected to phrase. With respect to claim 70, basis for the limitation "angle (δ)" can be found in claim 69. With respect to the objection to claim 45, the claim has been amended to obviate the Examiner argument. With regard to claims 49 and

55, the claimed range in claim 49 concerns the melt flow index of the second polymer of the mixture, whereas the claimed range in claim 55 concerns any polymer of the mixture. No amendments are needed to these claims. Similarly, no amendments are needed to claims 72 and 78. Applicant has particularly pointed out and distinctly claimed the subject matter which Applicant *regards as his invention*. The Examiner has not provided any evidence as to where the Examiner has said the claimed subject matter is not what Applicant regards as his invention. How the tip would place the wall of the reducer under centrifugal radial tension does not go to the issue of particularly pointing and distinctly claiming the subject matter which applicant regards as the invention. It goes to the manner in which the claimed invention operates. However, the law does not require Applicant to explain, or even understand, how the claimed invention works. Applicant merely needs to describe the invention, which Applicant has done. Thus, the second paragraph of 35 U.S.C. 112 has been fully satisfied. Should the Examiner maintain this position, the Examiner is respectfully requested to cite case law which indicates that Applicant must set forth in the claim how something works.

With respect to the rejection of claims 37 - 63, 65 - 71, 76, 80, and 81 on obviousness grounds, Dambricourt discloses a flexible tube comprising a wall made of C₄ - C₁₀ linear ethylene-olefin copolymer or a mixture of C₄ - C₁₀ linear olefin copolymers. The tube of Dambricourt is resistant to stress-cracking and impermeable to water vapor. The polymer mixture, which forms the wall of the tube, does not comprise any polypropylene.

Johnson et al describes films produced from copolymers of propylene and with from 3 to 47 weight percent ethylene. According to Johnson et al.'s specification, in column 8, lines

16 - 20, the flexural modulus of said copolymers can range from 20,000 psi to 100,000 psi and preferably from 40,000 psi, i.e. between 137.8 MPa and 689.7 MPa, and preferably between 275.9 MPa and 482.8 MPa. Johnson et al. is silent about the conditions of dispersion of the flexural resin composition, in other words, the dispersion factor K_d .

It is respectfully submitted that the combination of Dambricourt with Johnson et al. would neither teach nor suggest the presently claimed subject matter. It is far from obvious that one of ordinary skill in the art would have combined the teachings of Dambricourt with the teachings of Johnson et al to arrive at the tube of the present invention. To the contrary, there is no incentive for one of ordinary skill in the art to expressly use one of the polypropylenes of the compositions of Johnson et al., in the polymer mixture of Dambricourt. Indeed, polypropylenes present: a high rigidity, generally higher than that of polyethylenes, which limits the use of polypropylenes for the fabrication of flexible tubes (see page 4, lines 20 to 24 of the English translation of the PCT application corresponding to the present US application), and a low water barrier, generally lower than that of polyethylenes (see page 4, lines 27 to 30 of said PCT application).

Johnson et al. does not define the water-barrier characteristics of the products obtained from the polypropylene resin composition, whereas the main problem raised by the use of polypropylenes arises through the contradiction of the water-barrier characteristics and the rigidity (page 5, lines 13 to 17 of said PCT application).

Thus, one of ordinary skill in the art would not have been inclined to replace the ethylene-olefin copolymer of the composition of Dambricourt by a copolymer of propylene of Johnson et al. Even if one of ordinary skill in the art were

somehow motivated to combine Dambricourt and Johnson et al., they would not have arrived at the present invention, since there is absolutely no guidance in these references as to how to improve the conditions of dispersion of the flexural modulus values of the constituents of the resin composition, namely the dispersion factor Kd. For these reasons, the rejection of claims 37 - 63, 65 - 71, 76, 80, and 81 should be withdrawn.

With regard to the remaining obviousness rejections, neither Nishikawa nor Doherty et al. overcome the aforementioned deficiencies of Dambricourt and Johnson et al. Nishikawa discloses a laminate tube having a shoulder with improved barrier properties, characterized in that the shoulder comprises a material composed of: (A) 0 to 50 weight% of polyethylene; (B) 10 to 50 weight% of an ethylene-vinyl alcohol copolymer or a saponified ethylene-vinyl acetate copolymer, and (C) 10 to 90 weight % of a carboxylic acid-modified adhesive polyethylene resin. The material of the shoulder does not comprise polypropylene. Furthermore, in Nishikawa, the improvement of the barrier properties are due to the presence in the material of polyethylene, an ethylene-vinyl alcohol or vinyl acetate copolymer and a polyethylene resin, but not of the presence of polypropylene (see column 2, lines 52 - 56). Doherty et al. discloses a dispersing apparatus with a reusable beak off cap. Doherty et al. discloses more particularly an embodiment, in which the dispenser and the nozzle are indeed as a single piece (claim 19). Claims 64, 73 - 75, 77, and 79 are allowable for the same reasons as their parent claims, as well as on their own accord.

New claim 82 is allowable for the same reasons as claim 37 as well as on its own accord.

The objections to the specification and the drawings are duly noted. Appropriate correction to the specification and

drawings has been made. With regard to the specification, the reference to numeral 32 has been deleted from paragraph 0168 and reference numeral 17 has been added to paragraph 0175. With respect to the use of the trademarks AFFINITY and EXACT, Applicant submits that these marks have been used in a way which respects their trademark nature. See table 2 for example. There does not appear to be any instance where the terms are not used in capital letters. As for the superscript [™], such use is not need since the marks are used in terms of specific products with other indicia which would signify their trademark status, see lines 25 - 32 on page 20 of the specification. As for the drawings, FIGURE 6 has been amended herein to delete the reference numeral 32. The Examiner is hereby requested to approve the drawing change.

For the foregoing reasons, the instant application is believed to be allowable. Such allowance is respectfully solicited.

Should the Examiner believe an additional amendment is needed to place the case in condition for allowance, he is hereby invited to contact Applicant's attorney at the telephone number listed below.

A request for a three month extension of time is appended hereto.

The Director is hereby authorized to charge the extension of time fee in the amount of \$1,050.00 and the extra claim fee in the amount of \$50.00 to Deposit Account No. 02-0184.

If any additional fees are required in connection with this case, it is respectfully requested that they be charged to said Deposit Account No. 02-0184.

Appln. No. 10/543,077

Amdt. dated September 22, 2008

Reply to office action of March 25, 2008

Attorney Docket No.: 05-531

Respectfully submitted,

Gery Bernard Marie Cornil Dambricourt

By/Barry L. Kelmachter #29999/

Barry L. Kelmachter

BACHMAN & LaPOINTE, P.C.

Reg. No. 29,999

Attorney for Applicant

Telephone: (203)777-6628 ext. 112

Telefax: (203)865-0297

Email: docket@bachlap.com

Date: September 22, 2008